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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. [redacted]

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, S. W. DAVIES, S. D. COLLINS, and THE ATLANTIC SEAFOOD PRODUCERS, INC., a Corporation,

Appellants

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG and J. A. WILCOX, composing the South Carolina State Board of Fisheries, a body corporate, and ALONZO B. SEABROOK, the Chief Inspector thereof.

Appellees

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

EARL J. TOOMER, ET AL	**CASE NO. 415**
Appellants	**Brief Of Appellants**
vs.	**Opposing Motion To**
J. M. WITSELL, ET AL;	**Dismiss Appeal**
Appellees	

OCTOBER TERM 1947

Appellants avail themselves under Rule 7 of the Supreme Court of the United States of the privilege of answering the motion to dismiss or affirm filed by appellees.

The point raised in the motion filed by appellees can be summerized for the sake of brevity into three grounds, (a) That there are on substantial grounds for Supreme Court intervention, (b) That appellants have been guilty of infractions of the laws of South Carolina as to bar their right to equitable relief, and (c) That the statutes under attack are constitutional.

It is only fair to point out to this Honorable Court that this is not a case in which the only questions involved are merely whether there is discrimination against a few isolated individuals. If that were the only question, it might be admitted that this question

could be adjudicated in the State Court, and appealed later to the Supreme Court for determination of the constitutionality of the statutes under review.

The record of this case shows that the statutes in question are part of a general scheme to close the waters of South Carolina off its shores to everyone except citizens of South Carolina. For years fishermen of the various states have been enjoying reciprocal rights to fish in the waters off the shores of the various states. Fishing interests have grown and expanded since the decision in the case of **McCready vs. Virginia**, 94 U. S. 391, was rendered years ago. From the business of small inconsequential fishermen, the industry has grown to the point where millions of dollars have been invested in this trade and thousands of persons enjoy employment therefrom. At the present time, due to the shortage of food in all of the world, it is vital to the economy of this country that the widest latitude be allowed to the fishing business.

We believe we can argue with force, that what was right and proper in the days when our national economy was emerging from the million dollar class then to the billions of dollars class now invites a reviewby this Court of the entire picture.

While it is probable that under the earlier decisions of this Court, the rights of the states over fish and game could be viewed in the narrower aspect of states' rights, today changing economic conditions dictate that this country must not be cut up into forty-eight "little worlds," because the security and well-being of the citizens of one state are inexorably interwoven into the pattern of the security of all of the people of the entire United States.

If we are to hold to the narrow and ancient view, that "no one is his brother's keeper," then we invite a country divided against itself. If South Carolina is to be permitted to create a monoply for itself against the rights of the citizens of the other states, such other states, conscious of their consideration for the well-being of their own citizenry, can be expected in short order to pass equally repressive and perhaps more onerous laws than the ones now under consideration. If such a situation were to arise, then the thought of forty-eight little worlds would surely come into being.

Since the McCready case which merely held that a state had the right to protect itself against the invasion of other citizens where the food supply was insufficient to go around, there has been no clear cut decision of this Court as to just where a state can start and where it must stop. Conflicting decisions of state courts, district courts and circuit courts, each trying to harmonize with decisions of other courts, merely have added to the confusion that exists.

It is fundamental law that where a Federal constitutional question is involved and the proper elements of diversity and amount laid, a Federal Court has jurisdiction notwithstanding the extent of concurrent jurisdiction in the State Courts.

Home Tel & Tel Co. vs. Los Angeles
227 U. S. 228

Prentis vs. A. C. L.
211 U. S. 210

Smythe vs. Ames
169 U. S. 466

Wilcox vs. Consolidated Gas Co.
212 U. S. 19

In the case of **Home Tel and Tel Co. vs. Los Angeles, supra,** Mr. Chief Justice White used this strong language, "The enforcement of this doctrine (wait until the state courts have acted, (our language)) would render impossible the performance of the duty imposed on Federal Courts and inevitable paralysis would result."

The purpose of conferring jurisdiction on Federal Courts in diversity of citizenship cases was to make it the duty of the Federal Courts to decide even questions of state law when necessary.

Meredith vs. Winter Haven
320 U. W. 228

Judge Parker, in the opinion under review, used this expression, "If they should not pay the license, the criminal penalties which they would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters . . . there is no provision for payment of the license tax under protect and suit for its recovery, and it is clear that if appellants' contentions as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves."

The learned Circuit Court Judge did not point out the confusion and chaos that would be created in the fishing interests not only along the South Atlantic seaboard, but also along the rest of the coast, the Gulf and Pacific coast waters, as the proposition of substantial federal question and national importance was not before his Court for consideration. The fact that Judge Parker allowed the appeal in this case, however, indicates that he felt that this case was of

sufficient national importance to warrant a review of said case by the highest court of the land.

Appellees further contended before the trial Court that appellants had been guilty of previous criminal violations of the shrimp statutes of South Carolina, and, therefore, because of such conduct had forfeited their rights to relief at the hands of a Court of equity. They continue to urge this proposition on this Honorable Court.

Appellees have never cited any authority in support of this argument, and Judge Parker in his opinion rejected the view that because one or more of these appellants had on a previous occasion violated one of the statutes in dispute, that such a transgression was sufficient to bar them from relief against alleged unconstitutional laws.

The law seems to be well settled that where inequitable conduct is shown, the resulting disqualification extends only to the enforcement of equities which are founded upon the matter or transaction which the conduct involved. * * * The courts apply the maxim, "not by way of punishment for extraneous transgressions, but upon consideration that make for the advancement of right and justice."

Vol. 19 Am. Jur., Sec. 474, page 328

It is well settled that a Federal Court has jurisdiction to enjoin enforcement of an unconstitutional State Statute by state officers clothed with authority to enforce it, especially where it violated the Federal constitution, provided the remedy at law is inadequate, the enforcement will affect the property rights of the appellant, the injunction is necessary

to prevent irreparable injury and the case is reasonably free from doubt.

Cyclopedia of Federal Procedure (2 Ed), Vol. 13 Sec. 6570, and Footnotes, pp. 130-131-132 Callaghan & Co. 1944

Joyner vs. Browning
30 F Supp. 512

Michigan Cent. R. Co. vs. Michigan Public Utilities Comm.
271 F 319

Tyson & Bros. United Theater Ticket Offices vs. Banton
273 U S 418

Pennsylvania vs. West Virginia
262 U S 553

Arrowsmith vs. Voorhies
55 F (2d) 310

Ex Parte Young
209 U S 123

Wells Fargo & Co. vs. Taylor
254 U S 175, 183

Caldwell vs. Sioux Fall Stockyards Co.
242 U S 559

Atlantic Refining Co. vs. Trumbull
43 F (2d) 154

Mutual Orange Distributors vs. Agricultural Pro Rate Commission of Calif.
30 F Supp. 937

Public Service Co. of North Illinois vs. Corboy
250 U S 153

Reagan vs. Farmer's Loan & Trust Co.
154 U S 362

Elmer vs. Wallace
275 F 86

Cotting vs. Kansas City Stockyards
79 F 679

Henderson vs. Thompson
12 F Supp 519

Williams vs. McCartan
212 F 345

Chicago vs. Kendall
266 U S 94

Davis vs. Wallace
257 U S 478

Greene vs. Louisville
244 U S 499

Keokuk vs. Hamilton
258 U S 122

Appellees argue that there is no irreparable damage in this case sufficient to justify a Federal Court of equity to enjoin the enforcement of a state statute. This specious argument was rejected by Judge Parker. The case appellees cite of **American Federation of Labor vs. Watson 327 U S 582** was cited by appellants to the original three Judge Federal Court. That case was authority only for the proposition that Federal Courts will not inspect a state statute to see if its enforcement infringes the Federal Constitution,

until the state courts have first interpreted its construction, and then if that interpretation puts the statute in conflict with the United States Constitution, Federal Courts will interfere. In the present case there is nothing ambiguous about the South Carolina statutes, except the question as to whether they are honest dyed-in-the-wool conservation measures or whether they, like the wolf in Little Red Riding Hood, are clothed in misleading attire.

A Federal Court of equity functions just like a state court of equity once it assumes jurisdiction, if there are equitable principles involved.

Ewing vs. St. Louis
72 U S 413

Smith vs. Bourbon
127 U S 105

Gordon vs. Washington
295 U S 30

The term irreparable injury is one easy of ascertainment. The difficulty is in dissolving it into its component parts. When is an injury irreparable and when is it not? It has been held that an irreparable injury is one that cannot be repaired or adequately compensated for in money.

26 U S C A, Sec. 1543
Louisville Provision Co. vs. Glenn
18 Fed Supp. 423

Ainsworth vs. Munoskong Hunting and Fishing Club
116 N W 992

Acts tending to destroy a complainants' business,

custom and profits do an irreparable injury.

Millers Ins. vs. Journey Tailors' Union
15 Atl (2nd) 822

Sherman vs. Sterne
117 Atl. 631

Appellees argue that the only threathened result is a multiplicity of crimnal violations and an impairment of private business. If this were all it would still cover almost every gamut of a person's endeavor, but the results that follow from the enforcement of these statutes are much more fundamental. This case does not touch merely on the rights of a few individuals; it touches on the constant struggle of State against individual, State against State, and State against the central government. It means that from these statutes, other statutes more repressive and oppressive in nature will be enacted by the various States against the citizens of other States. It means a paralysis of the fishing industry. It means inflation of the cost of fish, one of the vitals of our food economy, for with restriction there always ensues inflation. It means confusion and dissension among thousands of citizens. It means the loss of employment to thousands of persons.

Appellants realize of course that this Honorable Court cannot consider for review every case that involves merely a determination of Federal violations. However, this case concerns, as we have pointed out, the determination of the measuring rod of States' States' rights, as they affect an industry whose investments run into untold figures, and involves the livelihood of thousands of persons whose entire method of living must be changed if the standard laid

down by the South Carolina statutes are upheld. We feel we are honest in our contention that not only are the issues substantial, but the impact and effect of this decision will be of tremendous import to the national economy. When the courts and even the states are in open conflict with each other, the time has arrived when this Court with its power and prestige should lay down the present day standard by which all men and interests can govern their conduct and way of life.

The right to take a direct appeal to the Supreme Court from the action of a three Judge Federal Court is recognized and permitted in Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380).

See

Paramount Pictures vs. Langer
306 U S 619
83 L. Ed. 1025
59 Sup. Ct. 641

Ex Parte Young
209 U S 123, 155, 162

Pennington vs. Palmer
255 U S 100

Terrence vs. Thompson
253 U S 194, 214

Packard vs. Barton
264 U S 140-143

We do not assume that this Honorable Court expects an exhaustive brief on the question as to the validity of the statutes under attack at this particular phase of the appeal. We wish therefore to briefly set

out the reasons why we feel that the statutes are unconstitutional and merit a ruling by this Court on the issues presented by the appeal.

For many years there were few recriminatory statutes in any of the Southern states on this question of fishing or shrimping privileges. The only restriction was when real conservation required such action. A review of the statutes involved in the instant case show that they never were designed to be merely regulatory or conservation measures. We do not concede that the cost of enforcing these laws entails a greater expense against non-residents than it does against residents, but if it did surely it does not cost the State of South Carolina a hundred times as much to enforce these laws against the one than it does against the other. No where in legal criminology have we found that the citizens of Georgia have ever been that flagrant in their violation of either tax or criminal laws. Another companion statute requires that the fish or shrimp caught must be brought into the ports of South Carolina, not for inspection, in fact the statute singularly omits to even use that phrase as an excuse, but solely for the purpose of imposing a direct tax, regardless whether the shrimp are to be sold in South Carolina or shipped elsewhere. On its face it might appear to non-fishermen that this is not an onerous exaction. However, it must be borne in mind that these articles are highly perishable and that refrigeration, warehouse and packing facilities will be required. This is not a vexatious requirement to fishermen of South Carolina who fish the entire year, for the cost of renting warehouses and installing refrigerating facilities for shrimp which are caught only a

part of the year can be staggered over the entire year, but to fishermen of other states who use the waters off of South Carolina for only a part of the year, the cost becomes proportionately much higher. In addition, fishing vessels of South Carolinans return regularly to home ports, while those of outsiders are required to consume additional time in going into these ports with attendant wear and tear and cost of operation. Another of the statutes under attack provides that an income tax must be paid on all shrimp caught in the waters off the shores of South Carolina, without regard to the place where the individual or corporation is domiciled and without regard to the state in wihch these profits are earned. In other words, this means double taxation in its most onerous form. The record further shows that the cost of the license is such that it not only reduces but destroys any possible profits, and none of the appellants could operate under this law without severe loss on their operations.

Appellees contend that these are conservation measures, but any contention must be based on fact. Calling an onion a rose does not make it a rose. The record shows that the statute places no limitation on the number of permits that can be issued to South Carolinians or on the size of the vessels employed or on the amount of the catch. The results are shown by the record. Since the passage of these laws, more licenses have been issued than ever before. It must be assumed therefore that more shrimp have been caught, but the shrimp have been caught by South Carolinians to whom more licenses have been issued. In fact, the total count of licenses, even with the drastic reduction in licenses to outsiders who come un-

der the $150.00 class (no $2,500.00 licenses have been issued) show that more licenses have been issued than ever before. Another fact which significantly negatives the appellees' contention that this is a bona fide conservation measure is that there is no requirement that the fish caught must be sold in South Carolina and not shipped elsewhere. There is also no limitation on the size of the boats or amount of the catch.

Appellees contend that the State of South Carolina has jurisdiction, for all purposes to at least the three mile limit. We concede that by common usage, states in regulating conduct and police regulations are not limited to their actual boundaries, but we submit, however, where the action sought to be taken is for tax purposes, the right of a state is limited to the boundaries which it establishes and South Carolina had established as its boundaries, the low water mark of the Atlantic Ocean.

Gen. Stat. S. C, Sec. 1
Pinckney vs. The Hungaria
41 F 109 (1889)
Dis. Ct. of S. C.

Assuming that the territorial limits of a state extend three miles seaward from its shore,the nature and extent of its control is a disputed question.

Pinckney vs. The Hungaria
Supra

U. S. vs. California
Advance opinion—Decision rendered by U. S. Sup. Ct. on June 23, 1947

See

Rex vs. Forty-nine Casks of Brandy
3 Hagg. Adm. 289

U. S. vs. Kessler
Baldw. 35

Queen vs. Keyn
L. R. 2 Exch. Div. 81

Cited in **Pinckney vs. The Hungaria,** supra.

Appellees contend that this Court has decided the question of the rights of the states to close the waters off of their shores to non-residents. The only case we can find on this precise question was the case of **Manchester vs. Mass. 139 U. S. 240 (1891)** in which this Court stated,

> "If there be liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, **upon which we express no opinion,** the statute may be considered as an impartial and reasonable regulation of this liberty."

In this case, unlike the case at bar, the purpose of the legislation was not for taxation, but for the preservation of fish.

In the case of Smith vs Maryland 15 L. Ed 269, in which the Supreme Court upheld the right of Maryland to prohibit the taking of oysters from its waters, the court was very careful on page 271 to point out that it was not decided that a State had a right beyond its **low water mark** to close such waters to persons of another State or to violate the provisions of the United States Constitution, the clearest expres-

sion of Judicial disapproval of the statutes under dispute that appellants have been able to find.

There are several other well known cases pertaining to the right of a state to legislate over industry in its waters, among these being **McCready vs. Commonwealth of Virginia,** 94 U. S. 391 (1877); **The Abby Dodge vs. United States,** 223 U. S. 166; and **Skiriotes vs. Florida,** 313 U. S. 69. However all of these cases must be distinguished from the case at bar for the reason that none deal with the subject of running or free-swimming fish or shrimp.

In **McCready vs. Vriginia,** cited supra, the court is upholding a statute prohibiting non-residents from planting oysters in its beds, compared the planting of oysters with the planting of any other crop in the soil of the state.

The **Abby Dodge vs. U. S.,** cited supra, involved the question of whether the State of Florida or the United States had the rights to legislate over the right to take sponges from the bed of the ocean. The Court distinctly states,

> "Here for the reason that the question arising relates only to sponges growing on the soil covered by water, we are not concerned with the subject of running fish and the extent of state and national power over such subject."

Indicative of the fact that the courts have shown no inclination to extend the doctrine of the Abby Dodge case to include other resources than sponges is the case of **U. S. vs. California,** cited supra, in which it was held that the state did not have power to control the oil deposits within the three mile limit off the coast of California. If the Abby Dodge rule gov-

erning sponges was not applicable to oil, which, like sponges, belongs to the soil under the waters, then it would be untenable to apply the Abby Dodge rule to the subject of running fish, or shrimp.

The Skirotes case, cited supra, also involved sponges, on the ground that such a statute was within the police power of the state.

It is clear that the statutes involved in the instant case were purely tax measures and were not passed for the purpose of conservation, and thus are not within the police powers of the state of South Carolina in that they only limit the number of licenses issued to non-residents and require proof of payment of income taxes by non-residents, and thus invite indiscriminate fishing by residents of the state of South Carolina.

One of the statutes under attack undertook to require a tax to be paid on all fish brought into the ports of South Carolina. The statute permits no liberty of action on the part of the fisherman. His act in bringing the fish into South Carolina is not a voluntary act on his part. It is involuntary and required under threat of penal prosecution. No reason other than the desire to tax is set forth in the statute. Not even a pretense of inspection, or health or food regulation is set forth in the statute. We contend that the tax is purely and simply an import tax.

The case of **Gulf Fisheries vs. Darrozet**, 17 F (2d) 1926, involved a statute of Texas which levied a tax on wholesale dealers of one dollar per one thousand pounds of fish brought into port and required that all products be subject to inspection. The court re-

cognized the principle that fish are imports and therefore not subject to taxation, but held the tax valid as an inspection tax.

In commenting on **Gulf Fisheries vs. Darrozet,** cited above, in **Hoovan and Allison vs. Evatt,** 324 U. S. 625 (1945) on page 770 the court says:

> "Chief Justice Marshall's decision (of imports) has received support in cases holding that fish caught in the open seas and brought into this country are imports entitled to constitutional protection although they did not come from a foreign country."
>
> Gulf Fisheries vs. Darrozet
> cited supra
>
> Booth Fisheries vs. Case
> 47 P (2) 834

In the same case, in commenting on **Gulf Fisheries vs. MacInerny,** 276 U. S. 124, the court further states:

> "In that case fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such and were no longer immune from the challenged state tax."

The statutes of South Carolina involved in the case at bar do not provide for inspection of the fish caught. Therefore, the tax can hardly be upheld as an inspection tax in the Gulf Fisheries case. Unlike the facts in the Gulf Fisheries case, the fish here involved were subjected to no processing. Since the facts do not bring this case within the **Gulf Fisheries** de-

cision, the fish must be considered imports and are not taxable.

We contend that the statutes enacted by the State of South Carolina violate the Commerce clause of the United States Constitution and are invalid.

The facts in the case of Foster-Fountain Co. and Sea Food Co.—U—E. J. Haydel, et al, 278 U. S. 1 (1928) are similar to the facts in the case at bar. In the Foster-Fountain Packing case, plaintiff was in the business of shrimping off the coast of Louisiana and shipping the unhulled shrimp to the Sea Food Company in Mississippi where they were canned. An act of Louisiana prohibited the shipping of unhulled shrimp from the state and the right to shrimp or can was restircted to residents of Louisiana. The court held the act invalid and stated,

> "As representative of its people the state might have retained the shrimp for consumption and use thereof . . . but the purpose of the act is not to retain the shrimp for the people of Louisiana; it is to favor canning of meat in Louisiana and violates the commerce clause of the Constitution."

In the case at bar, as has been previously pointed out in this brief, the purpose of the statutes is not to retain the fish and shrimp for consumption and use in South Carolina or to preserve them, but is merely a tax measure which in effect impedes interstate commerce and is thus violative of the commerce clause of the United States Constitution.

We contend that the statutes enacted by the state of South Carolina violate the privilege and immunity clause of the United States Constitution.

The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Art. IV, Sec. 2 (1) U. S. Constitution

Pavel vs. Richards,
28 F Supp. 992 (1928)

Pavel vs. Pattison
24 F Supp. 915

In an action to enjoin enforcement of act of the Legislature of Louisiana which provided resident trapper pay a license of two dollars per year, provided he shall have been a resident for two years, but required that a non-resident trapper pay a tax of two hundred dollars per year plus a cash deposit of three hundred dollars, the court held the statute invalid. "On the merit it seems clear that the effect of this statute is to deny to Pavel and his employees operating under the leases, equal protection of the law in violation of the Federal Constitution." The Court cited,

Ward vs. Maryland
12 Wall. 418

Booth vs. Lloyd et al
33 F 593

U. S. Constitution, Art. 4, Sec. 2

Chalker vs. Birmingham and N. W. R. Co.
249 U S 522

One of the rights secured by United States Constitution, Art. 4, Sec. 2, is that of a citizen of one state to remove to and carry on business in another, without being subjected in property or person to taxes

more onerous than the citizens of the latter state are subject to.

Shaffer vs. Carter
252 U. S. 221

The New York income tax law which allows residents of New York one thousand dollars personal exemption but denies same to non-residents violates the United States Constitution, Art. 4, Sec. 2.

Travis vs. Yale and Towne
252 U. S. 60

The constitutional provision that the citizens of each State shall be entitled to all privileges or immunities of citizens in the several states prevents a State from discriminating against citizens of other states in favor of its own citizens.

Hague vs. CIO
307 U. S. 496

Although concerning Alaska, a territory rather than a state, the case of **Haavik vs. Alaska Packers Association,** 263 U. S. 510 (1924) is analogous to the case at bar. An Act of Alaska imposed upon each resident of Alaska a tax of five dollars for school purposes, and upon each non-resident fisherman a tax of five dollars. The court held the tax valid on the facts which showed that the plaintiff, a non-resident, actually was within the jurisdiction of Alaska for four months of the year and was entitled to enjoy the protection of Alaska, and in paying the five dollar tax was paying the same amount required of all residents of Alaska.

"All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside; No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

Art. XIV, Sec. 1 U. S. Constitution

One of the oldest and best known decisions based on the proposition that one state cannot discriminate against residents of another is the case of **Ward vs. Maryland,** cited supra. Here a statute of Maryland prohibited a non-resident from selling goods without a license unless said goods had been manufactured in Maryland. No license was required of residents. The court held the statute to be a discriminatory tax and repugnant to the Constitution.

The case of **Pavel vs. Richards,** cited supra in this brief, likewise decreed that a higher tax for non-resident trappers than the tax required of resident trappers denied to non-residents the equal protection of the law in violation of the Federal Constitution.

In other cases, some of which have been cited, the courts are careful to determine whether there is discrimination against non-residents of another state.

In Skiriotes vs. Florida, cited supra, the court says,

"Equal protection clause is not violated by a statute, applicable equally to all persons, forbidding use of diving apparatus in taking commercial sponges."

In **Manchester vs. Mass.**, cited supra, we find the language:

> "The statute of Massachusetts . . . was passed for the preservation of the fish and makes no discrimination in favor of citizens of Massachusetts and against citizens of another state."

In **Barbier vs. Connolly**, 113 U. S. 27, is the rule that the state has board police powers if it affects equally all persons similiary situated.

Other cases in which the language of the court is unequivocal in holding that a state cannot discriminate against citizens of other states in favor of its own citizens are:

State of Minn. vs. Barber
10 S. Ct. 954
307 U. S. 496
83 L. Ed. 1423

Georgia Power Co. vs. City of Decatur
281 U. S. 505

Chalker vs. Birmingham
249 U.S. 522

Hague vs. CIO
307 U. S. 496

Hess vs. Pawloski
274 U. S. 352

Sunday Lake Iron Co. vs. Wakefield
274 U. S. 350

Walling vs. People of Mich.
116 U. S. 446

In fairness to the court, we wish to point out one decision in which discrimination against a non-resident in favor of a resident as to the amount of fishing taxes imposed was held valid although this case can be distinguished from the case at bar in that Alaska is a Territory and not a State. This is the case of **Anderson vs. Smith,** 71 F (2d) 493. Here the court upheld a tax of Twenty-five dollars imposed by the Territory of Alaska on non-residents for the use of gill nets. The court stated:

> "Territory of Alaska may fix license fees for fishing in waters of Alaska and in so doing may discriminate between residents and non-residents provided that the license exacted of citizens of the United States non-residents in Alaska **is not so exorbitant as to practically prohibit or so unreasonable as to interfere with rights of fishing granted by Congress."**

In line with this decision is **Freeman vs. Smith,** 44 F (2d) 703 in which an Alaskan statute exacting a tax of one dollar on resident fishermen and two hundred and fifty dollars on non-residents was held invalid.

See also:

Higman Towing Co. vs. Cochran
70 F Supp. 628

In the case at bar the statutes of South Carolina are clearly discriminatory. The amount of taxes required of non-residents of South Carolina are so exorbitant as to practically prohibit fishing, and is thus confiscatory. The tax required of non-resident fishermen is Twenty-five Hundred ($2500.00) Dollars, while the tax imposed on residents of South Carolina is

only Twenty-five ($25.00) Dollars, a difference of one hundred times as much. The law also requires that non-residents must make proof of payment of previous income tax, a discriminatory measure against non-resident fishermen.

The law further imposes unjust and unnecessary requirements on non-resident fishermen in that it requires that all fish caught off the shores of South Carolina must be brought into ports of South Carolina for the purpose not only of taxes but of packing, icing, and shipping, irrespective whether said fish are to be sold to residents of South Carolina or not, and therefore this regulation is certainly not a health measure.

Residents and non-residents engaged in the same occupation or business must be treated substantially alike in the matter of imposing a business license.

O'Connell vs. Kontojohn
179 SO 802

The police power of the state is not unlimited and must not be arbitrarily exercised and must be reasonable.

Feldman vs. Concernati
20 F. Supp. 531

House vs. Mayas
219 U S 270

Near vs. Minnesota
283 U S 697

Able State Bank vs. Weaver
292 U S 766

Property rights cannot be invaded by laws which under guise of police regulations have ulterior motives.

Road District No. 7 vs. Crittenden
28 Fed. (2d) 825

Courts function to determine in each case whether circumstances justify challenged regulations as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.

Paramount Pictures vs. Langer
306 U S 619

The limitation on legislative discretion in making classifications in statutes is that classification should not be arbitrary nor a subterfuge to shield one class and unduly burden another nor unlawfully oppress in its administration.

Frazier vs. State Tax Commission
175 SO 402
110 A L R 1479

People vs. Chapman
301 Mich 584
4 N W(2d) 18

State vs. King
188 A 775

Kelso vs. Bush
88 S W (2d) 594

Welch vs. State of New Hampshire
306 US 79

The principle that, without controlling Congressional action, a state may not regulate interstate com-

merce so as substantially to affect its flow or deprive it of needed uniformity in its regulation, is not to be avoided by simply invoking the convenient apologetics of police power.

So. Pac. Company vs. State of Ariz.
325 U. S. 761 (1945)

The courts have the right to go behind the presumption "the King can do no wrong" and see if the legislation was bona fide or was a guise to discriminate against non-residents, and if the latter to declare such statutes invalid, see,

Ex parte Thornton
12 Fed. 538, 547

In a very recent case decided by the Supreme Court of Georgia, to-wit: **Geele vs. State,** 43 S .E. Rep. (2d) 254, the court held that the basis for statutory classification must relate in some degree to the purpose of the legislation and where the state attempted to require hotels charging a certain rate to install fire escapes without making any reference to hotels that charged a higher rate, that this statute, although called a fire prevention statute, was anything other than such a law, was arbitrary, and had no conceivable relationship to the purpose of protecting guests against fire. The court quotes as its authority the case of **Southern RR vs. Greene,** 216 U. S. 400, and **Asbury Hospital vs. Cass County,** 326 U. S. 207.

CONCLUSION

Appellees place great stress upon the decision of **McCready vs. Virginia,** 94 U. S. 391, contending that based upon this decision the State has jurisdiction to control its fisheries to the exclusion of citizens of other states and its own citizens. The McCready case was concerned with waters within the limits of the state and in that case there was no question of the fact that the statute was a bona fide conservation statute. The case of **Pollards Lessee vs. Hagin,** 3 How. 212, like the McCready case, was merely concerned with inland waterways. In commenting on the Pollard case, Mr. Justice Black in the case of **U. S. vs. California,** cited supra, stated, "We are not persuaded to transplant the Pollard rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the **ocean.**"

Appellees also argue that the Manchester, Louisiana and Abby Dodge cases cited in U. S. vs. **California,** supra, are authorities for the proposition that the state has unlimited right to control fishing.

The Supreme Court answered this question on page 16 of the decision where the court used this expression, "That this question remained undecided is evidenced by **Skiriotes vs. Florida,** 313 U. S. 69, where we had occasion to speak of Florida's power over sponge fishing in its territorial waters. Through Mr. Chief Justice Hughes we said: 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the state statue so far as applied to conduct within the territorial waters of Florida . . . is within the police power of the State."

In other words the Supreme Court in the California case stated that if the states did have powers over fishing it was limited to conduct within the police powers and did not give the state the right to tax indiscriminately.

Others cases cited by appellees are not authorities for the purpose contended by appellants. In the case of Patsone vs. Penn., 232 U. S. 138 the court merely held that the state had a right to deny aliens the right to use guns and therefore could restrict the right to hunt.

Statutes involved in the case at bar are not conservation or preservation measures because they do not limit the supply of fish caught in that they allow residents of South Carolina the right of indiscriminate fishing; neither do they "conserve" the fish caught for consumption in the state of South Carolina, and for these reasons the statutes cannot be labeled conservation or preservation measures coming within the police powers of the state. The statutes do not fall within the classification of "police powers" as an inspection measure because nowhere in the statutes is there a provision for inspection. Appellants contend, therefore, that the measure is not one which can validly be termed conservation measure or police power measure but is merely a tax measure passed to discriminate against non-residents in violation of the United States Constitution.

Appellees fall into the error of contending that since these are allegedly conservation measures, they are therefore ipso facto legal, regardless of how many sections of the Federal Sonstitution they violate. We

are not so certain that this Court would go to that extent, even if the record showed these measures to be conservation measures.

Appellants share the same high regard for the learned Judge who wrote this opinion as this Court does. We fear that the trial Court failed to carefully scan the record in this case and assumed that since the statutes purported to be conservation measures, they were just that, and therefore the old rule of self preservation should first be applied. The facts however, negative such a view. The record shows that there were more shrimp hauled out of the waters of South Carolina before the enactment of this law than before, and that its only effect has been to create a monoply for the shrimping interests of South Carolina.

Assuming that this Court might hold to the view of appellees that the states possess this unbelievable right, we come to the final proposition as to how far can a state go to discriminate unreasonably and unjustly. This great nation has the inherent and unquestioned power to bar aliens and undesirables from our shores, but once this country removes the barrier ever so slight and admits them, can this nation then deny to them, the use of the courts, the right to labor, or own property, to trade or enjoy the four freedoms. By the same analogy, granting that the state had the right to determine when its doors should be closed for reasons best known to itself, could it after having opened these doors proceed to discriminate unjustly and unreasonably against the citizens of other states, or is it then compelled to obey the laws of the land

in the same degree that this country expects other citizens to act.

We submit that not only has this Court jurisdiction to entertain the appeal, but that the issues and the facts are of such vital juridical and national importance as to require the determination of the same on its merits.

Respectfully submitted,

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STATEMENT AS TO THE FACTS OF THE CASE:

Appellants, residents of Georgia and Florida, engaged in the business of fishing and shrimping off of the coastal waters of the Southeastern states, brought a bill in equity in the District Court of the United States for the Eastern District of South Carolina, Charleston Division, against J. M. Witsell, et al, as defendants, which said defendants compose the South Carolina State Board of Fisheries, and asked said Court for a temporary restraining order and an interlocutory and permanent injunction restraining said defendants from enforcing against appellants certain South Carolina statutes which provide that the coastal waters beyond the low water mark within the three-mile maritime belt shall be a common for the people of the State of South Carolina for the taking of fish and imposing an annual license fee of Twenty-five ($25.00) Dollars on boats engaged in shrimp fishing therein if owned by residents of South Carolina and a license fee of Twenty-five hundred ($2,500.-00) Dollars on boats owned by non-residents and further limiting the issuance of non-resident licenses to one hundred (100). Said statutes further impose a tax of one-eighth (1/8) cent per pound on green shrimp taken or shipped from said state and require all boats licensed to trawl for shrimp in the coastal waters within three miles of the ordinary low water mark of the coast of South Carolina to unload their catch of shrimp and pack and properly stamp the same within the State of South Carolina before shipping or transporting it to another state or the waters thereof and impose punishment for the violation thereof. (Record page 1-18, 19-23).

The facts of said case as evidenced by the record show that there is a diversity of citizenship between the parties, appellants and appellees, that the amount involved is in excess of Three thousand ($3,000.00) Dollars, that there is no adequate remedy at law by which the appellants may obtain relief, that serious property rights are involved, that irreparable damage is threatened to said appellants, that the Constitutionality of statutes forming the basis of the action taken by the appellees is involved, and that substantial issues of Federal and national importance are concerned. The record further discloses that appellants would be compelled, if they desire to fish in South Carolina waters, not only to pay a Twenty-five hundred ($2,500,00) dollar license fee per year as contrasted with a twenty-five ($25.00) dollar license fee by residents of South Carolina, but in addition would be compelled to pay an income tax on all profits made from fish caught in the waters of South Carolina, although said fish were sold in Georgia or Florida and on which profits income taxes were paid to said respective states, and further appellants would be required to bring said fish into the ports of South Carolina for the purpose of being unloaded, stamped packed and reloaded upon their vessels and as a result would have to rent warehouses and refrigeration facilities in said state of South Carolina. Appellants in addition thereto would be compelled to pay a poundage tax on the shrimp caught.

The facts disclose that said statutes, individually and as a composite whole, are prohibitive and confiscatory and make it impossible for the appellants to operate profitably in the waters off the shores of South Carolina. As a result of said statutes, more

licenses have been issued to residents of South Carolina than ever before, negativing the idea that said measures are conservation measures. The attention of the Court is called to the stipulations agreed to between the parties, particularly stipulation numbers 7, 10, 13, 14 and 16 made part of the record which establishes the undisputed facts as argued by appellants in this brief. (Record page 29-30).

The bill in equity filed by appellants attacked the validity and constitutionality of the Statutes enumerated in the record and also the jurisdiction of the state of South Carolina over the ocean waters within the three-mile maritime belt from the low water mark of the coast of the state of South Carolina.

(Record page 29-31, 32-49).

On August 18, 1947 a hearing on the temporary restraining order was held before a District Judge, the Honorable C. C. Wyche, who set the hearing on the prayer for an interlocutory injunction for a date certain and under and by virtue of Section 266 of the Judicial Code (28 U.S.C.A. 380), a statutory court, consisting of one Circuit Court Judge, namely, Honorable John J. Parker and two District Court Judges, namely, Honorable C. C. Wyche and Honorable George Bell Timmerman, was specially convoked and after a final hearing thereof, held on August 25, 1947, by an opinion rendered, which opinion is made a part of the record in said case and hereinafter referred to in this brief, said three judge court entered a fin. judgment and decree which dismissed appellants' complaint and denied the application for an interlocutory and permanent injunction. Said final order, judgment and decree was entered and appeared of record on September 13, 1947.

The case was heard and determined and the final judgment and decree was predicated upon the issues raised by appellants' complaint and appellees' return and answer (Record page 24-28) which were in substance as follows:

(1) Whether a Federal Court of Equity had jurisdiction to entertain the application for injunction,

(2) Whether the appellants were entitled to relief in equity because of having violated an equitable maxim of not coming into court with clean hands,

(3) Whether the statutes attacked were unconstitutional, and,

(4) Whether appellants were entitled to the relief which they sought or whether the proceedings should be remanded to a State Court.

The Court in its decree held that the appellants had a right to come into a Federal Court of Equity, that they had not violated any equitable maxim, and that the case did not have to be remanded back to a State Court; however, on the general basic proposition that the Statutes attacked were unconstitutional, the Court held that the Statutes were not unconstitutional and that the appellants because of said fact were not entitled to the relief sought. (Record page 49-60, 61-62).

From said adverse ruling of said Court and in conformity with the provisions of Section 266 of the Judicial Code of the United States, an appeal to this Honorable Court was made and allowed by the presiding Judge of said special three-Judge Court, namely, the Honorable John J. Parker, said petition for appeal having been presented and filed October 3, 1947,

All necessary pre-requisites, such as assignment of error, statement as to the jurisdiction, service, etc., were duly made in accordance with the rules of this Honorable Court. (Record page 63-68).

Subsequently a motion to affirm the judgment of the lower Court and to dismiss the appeal of the appellants was filed by the appellees on the grounds

(a) That the Supreme Court had no jurisdiction in the premises,

(b) That appellants had been guilty of such infractions as to bar their right to equitable relief,

(c) That the Statutes of South Carolina were constitutional,

Appellants filed, within the time provided by law, a brief in support of their legal position and this Honorable Court did, on the 24th day of November, 1947, note probable jurisdiction (Record page 69.) so that said case is now before this Court for argument and determination.

The basis upon which appellants feel that the Supreme Court of the United States has jurisdiction to entertain a direct appeal from the specially convened three Judge District Court is set out in the statement as to jurisdiction heretofore filed in said case. The statutory provision believed to sustain jurisdiction is found in Section 266 of the Judicial Code (28 U.S.C.A. Sec. 380) which concludes as follows:

"... and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

GENERAL STATEMENT OF ISSUES INVOLVED.

I. JURISDICTION.

Said case was properly brought in the United States District Court and is properly before the United States Supreme Court for review because there is a diversity of citizenship, the amount involved is over Three Thousand ($3,000,00) Dollars, there is no adequate remedy at law, the damages are irreparable, the statutes concerned violate the Constitution of the United States, and the questions involved are substantial and of national importance.

The right to appeal to the Supreme Court is provided for by Section 266 of the Judicial Code which concludes with the following words,

> "... and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

II. CONSTITUTIONALITY OF STATUTES INVOLVED.

The appellants contend that certain statutes of the State of South Carolina are void and unconstitutional as applied to them upon the following grounds:

1: That the State of South Carolina has no jurisdiction of the coastal waters or ocean within the three-mile maritime belt lying seaward off the ordinary low water mark of the coast of South Carolina.

2: That the said Statutes as applied to appellants make an arbitrary and unreasonable discrimination

between residents and non-residents of the State of South Carolina in violation of the Privileges and Immunities clause (Art. IV, sec. 2 (1)), and the Commerce clause (Art. I sec, 8 (3)), of the United States Constitution, and in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution.

3: That the Statutes impose a tax on imports and a burden on interstate commerce in violation of Article I, Sections 8 and 10 of the United States Constitution.

4: That said Statutes are not bona fide conservation measures, but were passed and operate to illegally deny citizens of other states rights granted to residents of South Carolina, and designed to perpetuate and create a monopoly to the citizens of South Carolina in the shrimp industry.

The Statutes of the State of South Carolina above referred to provide in substance as follows:

Section 3300 of the Code of South Carolina provides that all waters in the maritime belt within three miles seaward of the low water mark of the coast of the State of South Carolina shall be a "common for the people of the State for taking of fish" and requires that licenses be secured from the State of South Caro- of South Carolina for that purpose.

Section 3379 of the Code of South Carolina requires all fishing boats owned by residents of South Carolina to obtain an annual license for the sum of Twenty-five ($25.00) Dollars and all fishing boats

owned by non-residents of said state to secure an annual license for the sum of Twenty-five Hundred ($2500.00) Dollars, provided that licenses required of non-residents who have operated their boats in South Carolina during each of three preceding years may be secured by said non-residents for One Hundred Fifty ($150.00) Dollars, and further limiting the number of non-resident fishing licenses to one hundred.

Section 3374 of the Code of South Carolina imposes a tax of one-eighth (1/8) cent per pound on all green shrimp taken in the ocean waters within the three mile maritime belt of said State as hereinbefore set forth.

Section 3414 of the Code of South Carolina requires all boats licensed to trawl for shrimp in the maritime belt or ocean waters within three miles of the low water mark of the coast thereof to bring their catch of shrimp and fish into the ports of South Carolina where they shall be unloaded, packed and properly stamped before shipping or transporting to another State or the waters thereof.

Section 3407 of the Code of South Carolina provides Penalties of One Thousand ($1,000.00) Dollars fine and imprisonment of not more than six months for violation of the foregoing statutes.

(Record page 11-17, 22).

SPECIFICATION OF ERRORS ASSIGNED

1: That the State of South Carolina did not have the authority to enact the various statutes under attack in this case because it lacked the jurisdiction to enact tax laws beyond the low water mark of the Atlantic Ocean bounding its border on the East, as set out in Section 2038 of the Civil Code of 1942 of the State of South Carolina. (Record page 66).

2: That the State of South Carolina did not have the legal right to enact the statute set out in said petition which required a tax to be paid on all shrimp caught on the open sea and which required that said shrimp be brought into the ports of South Carolina for the purposes of taxation, which statute is in violation of the power of a state to tax imports. (Record page 66).

3: That the State of South Carolina did not have the legal right to enact the statute set out in the petition known as Section 3414 of the Civil Code of the State of South Carolina 1942 which required that shrimp caught off the coast of South Carolina be brought into the ports of that State for packing and a payment of a tax on the shrimp to be shipped beyond the limits of the State, said statute being violative of the equal protection, due process, privilege and immunities and an undue burden on commerce, and was not a valid and bona fide health, conservation or police regulation. (Record page 66).

4: That the State of South Carolina did not have the legal right to enact the statute set out in the petition and known as amended act of section 3379 of the 1942 Civil Code of South Carolina, which statute limited the number of licenses which could be issued to

non-residents while permitting an unlimited number to residents and which required that non-residents pay a license of Twenty-five hundred ($2500.00) dollars per year while residents only were required to pay Twenty-five ($25.00) Dollars per year, and also required as a preliminary requisite that non-residents pay income tax for preceding years to South Carolina, said statute being violative of the equal protection, due process, privilege and immunities, and commerce clauses of the Constitution of the United States. (Record page 66).

5: That the statutes set out in appellants' petition were all part of a general plan or scheme to discriminate unfairly and unjustly against non-residents, and said various acts were so onerous that said non-residents could not shrimp profitably in the waters off South Carolina, and said statutes were neither bona fide health, regulatory or conservation measures, and being violative of the equal protection, due process, privilege and immunities, and the commerce clauses.

6: That appellants had the right to file said bill in equity in a Federal Court of equity, and under the pleadings, evidence and the law were entitled to the relief sought. (Record page 66).

7: That the three Judge Federal Court erred in refusing to render a decree in favor of the appellants, the evidence and the law demanding a finding in their favor. (Record page 66).

8: That the Supreme Court has jurisdiction to entertain said appeal, and that the facts are of such national importance, and the law involved of such a substantial nature, that said Court should hear said appeal, and subsequently thereafter render decision in favor of appellants on the merits of said appeal.

ARGUMENT AND AUTHORITIES

I. JURISDICTION

It is fundamental law that where a Federal constitutional question is involved and the proper elements of diversity and amount laid, a Federal Court has jurisdiction notwithstanding the extent of concurrent jurisdiction in the State Courts.

Home Tel. & Tel. Co. vs. Los Angeles
227 U. S. 278

Prentis vs. A. C. L.
211 U. S. 210

Smyth vs. Ames
169 U. S. 466

Wilcox vs. Consolidated Gas Co.
212 U. S. 19

In the case of **Home Tel. and Tel. Co. vs. Los Angeles, supra,** Mr. Chief Justice White used this strong language, "The enforcement of this doctrine (wait until the state courts have acted) would render impossible the performance of the duty imposed on Federal Courts and inevitable paralysis would result."

The purpose of conferring jurisdiction on Federal Courts in diversity of citizenship cases was to make it the duty of the Federal Courts to decide even questions of state law when necessary.

Meredith vs. Winter Haven
319 U. S. 736

Appellees contended before the trial Court that appellants had been guilty of previous criminal violations of the shrimp statutes of South Carolina, and,

therefore, because of such conduct had forfeited their rights to relief at the hands of a Court of equity. They continue to argue this proposition in this Honorable Court.

Appellees have never cited any authority in support of this argument, and Judge Parker in his opinion rejected the view that because one or more of these appellants had on a previous occasion violated one of the statutes in dispute, that such a transgression was sufficient to bar them from relief against alleged unconstitutional laws. (Record page 52).

The law seems to be well settled that where inequitable conduct is shown, the resulting disqualification extends only to the enforcement of equities which are founded upon the matter or transaction which the conduct involved. The courts apply the maxim, "not by way of punishment for extraneous transgressions, but upon consideration that make for the advancement of right and justice."

Am. Jur. Vol. 19, Sec. 474, p. 328

It is well settled that a Federal Court has jurisdiction to enjoin enforcement of an unconstitutional state statute by state officers clothed with authority to enforce it, especially where it violated the Federal Constitution, provided the remedy at law is inadequate, the enforcement will affect the property rights of the appellant, the injunction is necessary to prevent irreparable injury and the case is reasonably free from doubt.

Caldwell vs. Sioux Fall Stockyards Co.
242 U. S. 559

Chicago vs. Kendall
266 U. S. 94

Davis vs. Wallace
257 U. S. 478

Ex Parte Young
209 U. S. 123

Greene vs. Louisville
244 U. S. 499

Keokuk and Hamilton Bridge Co. vs Salm,
258 U. S. 122

Pennsylvania vs. West Virginia
262 U. S. 553

Public Service Co. of N. Illinois vs. Corboy
250 U. S. 153

Reagan vs. Farmer's Loan & Trust Co.
154 U. S. 362

Tyson & Bros. United Theater Ticket Offices vs. Banton
273 U. S. 418

Wells Fargo & Co. vs. Taylor
254 U. S. 175, 183

Arrowsmith vs. Voorhies
55 F. (2d) 310

Atlantic Refining Co. vs. Trumbull
43 F (2d) 154

Cotting vs. Kansas City Stockyards
79 F 679

Elmer vs. Wallace
275 F 86

Michigan Cent. R. Co. vs. Michigan Public Utilities Comm.
271 F 819

Williams vs. McCartan
212 F 345

Henderson vs. Thompson
12 F Supp 519

Joyner vs. Browning
30 F Supp 512

Mutual Orange Distributors vs. Agricultural Pro Rate Commission of Calif.
30 F Supp 937

Cyclopedia of Federal Procedure (2),
Vol. 13, Sec. 6570, and Footnotes, pp. 130-131-132-Callaghan & Co., 1944

Appellees argue that there is no irreparable damage in this case sufficient to justify a Federal Court of equity to enjoin the enforcement of a state statute. This specious argument was rejected by Judge Parker. The case appellees cite of **American Federation of Labor vs. Watson**, 327 U. S. 582 was cited by appellants to the original three Judge Federal Court. That case was authority only for the proposition that Federal Courts will not inspect a state statute to see if its enforcement infringes the Federal Constitution, until the state courts have first interpreted its construction, and then if that interpretation puts the statute in conflict with the United States Constitution, Federal Courts will interfere. In the present case there is nothing ambiguous about the South Carolina statutes, except the question as to whether they are honest dyed-in-the-wool conservation measures or whether they, like the wolf in Little Red Riding Hood, are clothed in mis-leading attire.

Judge Parker, in the opinion under review, used

this expression, "If they should not pay the license, the criminal penalties which they would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters . . . there is no provision for payment of the license tax under protest and suit for its recovery, and it is clear that if appellants' contentions as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves."

(Record page 51).

A Federal Court of equity functions just like a state court of equity once it assumes jurisdiction, if there are equitable principles involved.

Ewing vs. St. Louis
72 U. S. 413

Smith vs. Bourbon County
127 U. S. 105

Gordon vs. Washington
295 U. S. 30

The term "irreparable injury" is one easy of ascertainment. The difficulty is in dissolving it into its component parts. When is an injury irreparable and when is it not? It has been held that an irreparable injury is one that cannot be repaired or adequately compensated for in money.

26 U. S. C. A., Sec. 1543

Louisville Provision Co. vs. Glenn
18 F Supp 423

Ainsworth vs. Munoskong Hunting and Fishing Club
116 N. W. 992

Acts tending to destroy a complainant's business, custom and profits do an irreparable injury.

Millers Ins. vs. Journey Tailors' Union
15 Atl. (2d) 822

Scherman vs. Sterne
117 Atl. 631

Appellees argue that the only threatened result is a multiplicity of criminal violations and an impairment of private business. If this were all it would still cover almost every gamut of a person's endeavor, but the results that follow from the enforcement of these statutes are much more fundamental. This case does not touch merely on the rights of a few individuals; it touches on the constant struggle of State against individual, State against State, and State against the central government. It means that from these statutes, other statutes more repressive and oppressive in nature will be enacted by the various states against the citizens of other states. It means a paralysis of the fishing industry. It means inflation of the cost of fish, one of the vitals of our food economy, for with restriction there always ensues inflation. It means confusion and dissension among thousands of citizens. It means the loss of employment to thousands of persons.

The Court below delivered a written opinion, a large part of which is devoted to the discussion of the jurisdiction of the Court over the subject matter and whether or not injunctive relief was appropriate in the instant case. In this connection the Court said:

> "It is clear, however, that t h e r e is diversity of citizenship and that the cause of action asserted by the plaintiffs arises under

the Constitution of the United States. Plaintiffs cannot bring themselves within a $150.00 license provision and as to one or more of them, the license fees which they are required to pay under the act will amount to $5,000.00 or more. If they should not pay the license the criminal penalties which would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters and this would involve loss of business for a number of the plaintiffs in excess of $3,000.00 annually. There is no provision for payment of the license tax under protest and suit for its recovery; and it is clear that if plaintiffs' contention as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves." (Record page 51).

The right to take a direct appeal to the Supreme Court from the action of a three Judge Federal Court is recognized and permitted in Section 266 of the Judicial Code (28 U.S.C.A., Sec. 380).

See:

Paramount Pictures vs. Langer
306 U. S. 619

Ex Parte Young
209 U. S. 123, 162

Kennington vs. Palmer
255 U. S. 100

Terrace vs. Thompson
263 U. S. 197-214

Packard vs. Banton
264 U. S. 140-143

II. THE STATUTES INVOLVED ARE UNCONSTITUTIONAL AND ILLEGAL

A. The Statutes Are Not Within The Jurisdiction of The State of South Carolina.

1. The State of South Carolina has no jurisdiction of the coastal waters beyond the low water mark.

Appellees contend that the State of South Carolina has jurisdiction for all purposes to at least the three mile limit. Appellants concede that by common usage, states in regulating conduct and police regulations are not limited to their actual boundaries, but we submit, however, that where the action sought to be taken is for tax purposes, the right of a State is limited to the boundaries which it establishes, and South Carolina had established as its boundaries, the low water mark of the Atlantic Ocean.

Gen. Stat. S. C. Sec. 1

Pinckney vs. The Hungaria
41 F 109 (1889)
Dist. Ct. of S. C.

Assuming that the territorial limits of a State extend three miles seaward from its shores, the nature and extent of its control is a disputed question.

Pinckney vs. The Hungaria,
supra

U. S. vs. California
Advance opinion—Decision rendered by U. S. Supreme Court on June 23, 1947

See:

Rex vs. Forty-nine Cases of Brandy
3 Hagg. Adm. 289

U. S. vs. Kessler
Baldw. 35

Queen vs. Keyn
L. S. 2 Exch. Div. 81

Appellees contend that this Court has decided the question of the rights of states to close the waters off their shores to non-residents. The only case that we can find on this precise question is the case of **Manchester vs. Mass.**, 139 U. S. 240 (1891) in which this Court stated,

> "If there be liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or citizens of the United States, **upon which we express no opinion**, the statute may be considered as an impartial and reasonable regulation of this liberty."

In this case, unlike the case at bar, the purpose of the legislation was not for taxation, but for the preservation of fish, and in the Manchester case the action complained of took place in a bay and not in the waters off of the coast of the state.

In the case of **Smith vs. Maryland**, 59 U. S. 71, in which the Supreme Court upheld the right of Maryland to prohibit the taking of oysters from its waters, the Court was very careful to point out that it was not decided that a State had a right **beyond its low water mark** to close such waters to persons of another state or to violate the provisions of the United States Constitution, the clearest expression of Judicial disapproval of the Statutes under dispute that appellants have been able to find.

There are several other well known cases pertaining to the right of a State to legislate over industry in its waters, among these being **McCready vs. Commonwealth of Virginia**, 94 U. S. 391 (1877); **The Abby Dodge vs. United States**, 223 U. S. 166; and **Skiriotes vs. Florida**, 313 U. S. 69. However, all of these cases must be distinguished from the case at bar for the reason that none deal with the subject of running or free-swimming fish or shrimp.

In **McCready vs. Virginia**, cited supra, the Court in upholding a statute prohibiting non-residents from planting oysters in its beds, compared the planting of oysters with the planting of any other crop in the soil of the state.

The **Abby Dodge vs. U. S.**, cited supra, involved the question of whether the state of Florida or the United States had the right to take sponges from the bed of the ocean. The Court distinctly stated,

> "Here for the reason that the question arising relates only to sponges growing on the soil covered by water, we are not concerned with the subject of running fish and the extent of state and national power over such subject."

Indicative of the fact that the courts have shown no inclination to extend the doctrine of the **Abby Dodge** case to include other resources than sponges is the case of **U. S. vs. California**, cited supra, in which it was held that the state did not have power to control the oil deposits within the three mile limit off the coast of California. If the **Abby Dodge** rule governing sponges was not applicable to oil, which, like sponges, belongs to the soil under the waters, then it would

be untenable to apply the **Abby Dodge** rule to the subject of running fish or shrimp.

The **Skiriotes** case, cited supra, also involved sponges, and was decided on the ground that the statute there involved was within the police power of the State.

2. The statutes involved are not within the Police Power of the state either for the purpose of taxation or as "bona fide" conservation measures.

It is clear that the statutes involved in the instant case were purely tax measures and were not passed for the purpose of conservation. The record does not disclose the necessity for conservation, and thus the statutes are not within the police powers of the state of South Carolina. The statutes only limit the number of licenses that can be issued to non-residents, but place no limitation on the number issued to residents. The statutes require proof of payment of income taxes by non-residents and require the payment of a tax per pound on shrimp packed and shipped beyond the limits of the State, but do not limit the size or amount of shrimp or fish caught. The result is not to preserve shrimp or conserve them for consumption in South Carolina but to invite indiscriminate shrimping by residents of the state of South Carolina while placing prohibitive and onerous restrictions on the non-residents who seek to shrimp in the waters off the state of South Carolina.

Appellees contend that these are conservation measures, but any contention must be based on fact. Calling an onion a rose does not make it a rose. The record shows that the statute places no limitation on the number of permits that can be issued to South

Carolinians or on the size of the vessels employed or on the amount of the catch. The results are shown by the record. Since the passage of these laws, more licenses have been issued than ever before. It must be assumed therefore that more shrimp have been caught, but the shrimp have been caught by South Carolinians to whom more licenses have been issued. In fact, the total count of licenses, even with the drastic reduction in licenses to outsiders who come under the $150.00 class (no $2,500.00 licenses have been issued) shows that more licenses have been issued than ever before. Another fact which significantly negatives the appellees' contention that this is a bona fide conservation measure is that there is no requirement that the fish caught must be sold in South Carolina and not shipped elsewhere.

Appellees urge that since in one of the preambles to one of the statutes in question some reference is made to conservation, that therefore this establishes that the measures were conservation measures. Presumptions as to the purpose of an act are not indulged in by the Courts to the extent of over-ruling the rule of reason. In **Bayside Fish Flour Company vs. Gentry,** 297 U. S. 422, 80 L. Ed. 772, this court held that a state statute restricting the processing of fish, **the plain purpose of which is simply to conserve,** is valid, but we submit that where the plain purpose of the statute is not to conserve but to monopolize the shrimp industry, this court is not compelled to stop at the label. Just as chemistry can be dissolved into its component parts, so can the law be analyzed and examined both as to cause and effect.

There is an old expression, used quite often, "The proof of the pudding is in the eating." Regardless

what label the appellees use, the fact remains, that as a result of the Statute more licenses were issued than ever before.

The police power of the State is not unlimited and must not be arbitrarily exercised and must be reasonable.

Feldman vs. Cincinnati
20 F Supp 531

House vs. Mayas
219 U. S. 270

Near vs. Minnesota
283 U. S. 697

Abie State Bank vs. Weaver
282 U. S. 766

Property rights cannot be invaded by laws which under guise of police regulations have ulterior motives.

Road District No. 7 vs. Crittenden
28 F (2d) 825

The courts have the right to go behind the presumption "the King can do no wrong" and see if the legislation was bona fide or was a guise to discriminate against non-residents, and if the latter to declare such statutes invalid, see,

Ex parte Thornton
12 F. 538, 547

In a very recent case decided by the Supreme Court of Georgia, to-wit: **Geele vs. State, 43 S. E.** (2d) 254, (1947), the court held that the basis for statutory classification must relate in some degree

to the purpose of the legislation and where the state attempted to require hotels charging a certain rate to install fire escapes without making any reference to hotels that charged a higher rate, that this statute, although called a fire prevention statute, was anything other than such a law, was arbitrary, and had no conceivable relationship to the purpose of protecting guests against fire. The court quotes as its authority the case of **Southern RR vs. Greene,** 216 U. S. 400, and **Asbury Hospital vs. Cass County,** 326 U. S. 207.

For many years there were few recriminatory statutes in any of the Southern states on the question of fishing or shrimping privileges. The only restriction was when real conservation required such action. A review of the statutes in the instant case show that they never were designed to be merely regulatory or conservation measures. We do not concede that the cost of enforcing these laws entails a greater expense against non-residents that it does against residents, but if it did, surely it does not cost the state of South Carolina a hundred times as much to enforce these laws against the one than it does against the other. Nowhere in legal criminology have we found that the citizens of Georgia have ever been that flagrant in their violation of either tax or criminal laws.

The Court below in rendering its opinion on the merits of the controversy as to the validity of the statutes assumed a premise which the record does not support. The lower Court took the position that the measures were conservation measures and, therefore, that the state of South Carolina had a right to pass them, irrespective whether they violated certain sec-

tions of the Constitution pointed out in the petition or not. (Record page 56-57.) A review of the record and of the statutes themselves shows that they were conceived with only one view in mind, and that was to create a monoply for the benefit of certain South Carolinians by prohibiting citizens of other states from fishing in the waters off the shores of South Carolina, and that all of these measures had this patent and ulterior purpose.

B. THE STATUTES VIOLATE THE IMPORT DUTY CLAUSE OF THE UNITED STATES CONSTITUTION.

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: . . . "

U. S. Constitution, Art. I, Sec. 10 (2)

One of the Statutes under attack requires a tax to be paid on all fish brought into the ports of South Carolina. The statute permits no liberty of action on the part of the fisherman. His act in bringing the fish into South Carolina is not a voluntary act on his part. It is involuntary and required under threat of penal prosecution. No reason other than the desire to tax is set forth in the statute. Not even a pretense of inspection, for health or food regulation is set forth in the statute. We contend that the tax is purely and simply an import tax.

The case of Gulf Fisheries vs. Dorret, 17 F (2d) 374 (1926), involved a statute of Texas which levied a tax on wholesale dealers of one dollar per one thousand pounds of fish brought into port and required that

all products be subject to inspection. The Court recognized the principle that fish are imports and therefore not subject to taxation, but held the tax valid as an inspection tax.

In commenting on **Gulf Fisheries vs. Darrozet,** cited above, in **Hooven and Allison vs. Evatt,** 324 U. S. 625 (1945) on page 770, the Court says,

> "Chief Justice Marshall's decision (of imports) has received support in cases holding that fish caught in the open seas and brought into this country are imports entitled to constitutional protection although they did not come from a foreign country."
>
> Gulf Fisheries vs. Darrozet
> Cited supra
>
> Booth Fisheries vs. Case
> 47 P (2d) 834

In the same case, in commenting on **Gulf Fisheries vs. MacInerney,** 276 U. S. 124, the Court further states:

> "In that case fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such and were no longer immune from the challenged state tax."

In line with the logic of the reasoning employed in the **Gulf Fisheries** case was the ruling made in the case of **State vs. Jutstrom Fish Company, 39 P. (2d) 355, 149 Oregon 362 (1935)** where the court held that fish caught beyond the three mile limit if constituting imports lost their character as such and became subject to state poundage tax on wholesale fish dealer

after being purchased by dealer and **beheaded and reiced for shipment to other states.**

The Court's attention is called to the fact that in the statutes under review the poundage tax is levied on all holders of licenses of the state of South Carolina, and while it limits the tax to green shrimp caught within the three mile limit, it is impossible to ascertain once a vessel docks which shrimp had been caught within the three mile limit and which were caught on the high seas beyond this zone.

The law is clear that when the Federal Constitution was adopted the people gave to the federal government exclusive power over the external affairs of the nation, including as a part thereof, the power to levy and collect imports and duties on imports from foreign countries. These powers have been recognized and maintained by the courts, and a state not only has no right to levy and collect import duties but it cannot interfere with, obstruct nor question the policy of any laws which Congress may constitutionally enact on these subjects.

Board of Trustees of the Univ. of Ill. vs. U. S.
289 U. S. 48

While it is true that the above decision discusses the prohibition of the right to tax imports from foreign countries, the result would be the same where fish or shrimp are concerned, as free swimming shrimp or fish, ferae naturae connot be classified as the property of any state, individual or nation. See: In re: Dunkly, 64 F. Supp. 10.

The statutes of South Carolina involved in the case at bar do not provide for inspection of the fish

caught. Therefore the tax can hardly be upheld as an inspection tax as in the **Gulf Fisheries** case. Unlike the facts in that case, the shrimp in the present case were subjected to no processing, nor had they been changed in character as set out by the facts in the **Justrom** case. Since the facts do not bring this case within the exception laid down in those cases, the fish must be considered as imports, and are therefore not taxable.

In this connection, it would not be impertinent to point out that the trial Court made no effort to explain away the **Gulf Fisheries** decision. It contented itself merely with the statement that "the State having the power over fishing in the maritime belt, the whole basis of the importation point goes out of the case." (Record page 57).

With due deference to the learned Jurist who wrote the opinion, we state that this contention cannot be brushed away with a mere sweep of the hand.

C. THE STATUTES VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITION AND ARE INVALID.

"The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U. S. Constitution, Art. I, Sec. 8 (3)

The facts in the case of **Foster-Fountain Packing Co. and Sea Food Co. vs. E. J. Haydel, et al.**, 278 U. S. 1 (1928) are similiar to the facts in the case at bar. In the Foster-Fountain Packing case, plaintiff was in the business of shrimping off the coast of Louisiana and shipping the unhulled shrimp to the Sea Food

Company in Mississippi where they were canned. An act of Louisiana prohibited the shipping of unhulled shrimp from the state and the right to shrimp or can was restricted to residents of Louisiana. The Court held the act invalid and stated,

> "As representative of its people the state might have retained the shrimp for consumption and use thereof . . . but the purpose of the act is not to retain the shrimp for the people of Louisana; it is to favor canning of meat in Louisiana and violates the commerce clause of the Constitution."

In the case at bar, the purpose of the statutes is not to retain the fish and shrimp for consumption and use in South Carolina or to preserve them, but is merely a tax measure which in effect impedes interstate commerce and is thus violative of the commerce clause of the United States Constitution.

Although a state has power to tax property within its confines, whether employed in interstate commerce or not, it cannot impose a tax for a privilege of engaging in such commerce.

Independent Warehouses vs. Scheele
45 Atl. (2d) 703 (N. J.)

Aerated Products Co. of Philadelphia, Pa.
vs.
Dept. of Health of the State of New Jersey
59 F Supp 652

While interstate commerce must pay its way, nevertheless state cannot impose undue or discriminatory barriers around its borders to bar out trade from other states.

Nippert vs. City of Richmond
327 U. S. 416

While it is true that states can place regulations, and even restrictions to some extent, around articles even though they move in interstate commerce, the law of reason applies in such matters the same as in every other matter which affects the public interest, and in determing what constitues an undue burden upon interstate commerce by reason of a local tax the interest of the state is weighed and balanced against the national interest and courts will look to the nature of the state regulations, its objective and its effect.

State vs. Prudential Ins. Co. of America
64 N. E. (2d) 150

The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation, is not to be avoided by simply invoking the convenient apologetics of police power.

So. Pac. Co. vs. State of Ariz.
325 U. S. 761 (1945)

The Courts have held that it is not the mere fact or form of licensing by a state, but what the license stands for by way of regulation that is important in determining whether the commerce clause of the Constitution is violated.

Robertson vs. People of State of California
328 U. S. 440

In those states where poundage taxes were levied on fish and shrimp, which authorities have been previously set forth in said brief, the same were placed on the basis of inspection charges. In the present

statutes no pretense as to the reason for the imposition of this tax is made in the law at all. The trial Jurist attempted to supply this deficiency in the opinion, when he wrote, "As to interstate commerce, the requirement that the shrimp destined for out of state shipment be stamped and properly packed is a proper regulatory provision. It is reasonable relation not only to maintaining the good reputation of products originating in the State but also to insuring the collection of the one-eighth cent per pound tax, which in the absence of some such requirement could be easily evaded on shrimp shipped out of the State." (Record page 57).

This argument is fallacious in many respects. In the first place, the reputation of the products of a State are as well known when consumed by non-residents within that State as when consumed without that State. Further there is no provision made for inspection. Surely the payment of a tax on bootleg whiskey would not protanto make it bonded liquor. Finally the Act makes no requirement that the shipment be stamped as to size, quality, etc., so how could the requirement that they be packed, and shipped furnish any help to the revenue officers as to the type of crustaceans, its quality, or size or weight.

It is therefore submitted that under this section of the Constitution, said statutes are void in that they are not bona fide attempts to regulate the business of shrimping or to protect and to preserve the shrimp for the people of South Carolina, but are measures which were designed and put into operation for the sole and definite purpose of creating a monopoly of the shrimping industry in that state to the exclusion of citizens of every other state in the

Union, that the tax and the other regulations used were used designedly, having that sole object and nature, and thus the statutes violate the Commerce Clause of the United States Constitution.

D. THE STATUTES VIOLATE THE PRIVILEGE AND IMMUNITY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION CLAUSE.

1. "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."

U. S. Constitution, Art. IV, Sec. 2 (1)

One of the oldest and best known decisions based on the proposition that one state cannot discriminate against residents of another is the case of **Ward vs. Maryland,** 12 Wall. 418. Here a statute of Maryland prohibited a non-resident from selling goods without a license unless said goods had been manufactured in Maryland. No license was required of residents. The court held the statute to be a discriminatory tax and repugnant to the Constitution.

The cases of **Pavel vs. Richards,** 28 F. Supp. 992 (1928) and **Pavel vs. Pattison,** 24 F. Supp. 915 were concerned with an action to enjoin enforcement of an act of the Legislature of Louisiana which provided that a resident trapper pay a license of two dollars per year, provided he shall have been a resident for two years, but required that a non-resident trapper pay a tax of two hundred dollars per year plus a cash deposit of three hundred dollars. The court held the statute invalid and in the opinion states, "On the merit it seems clear that the effect of this statute is

to deny to Pavel and his employees operating under the leases, equal protection of the law in violation of the Federal Constitution." The Court cites,

U. S. Constitution, Art. 4, Sec. 2

Ward vs. Maryland
12 Wall. 418

Booth vs. Lloyd, et al
33 F. 593

Chalker vs. Birmingham and N. W. R. Co.
249 U. S. 522

One of the rights secured by United States Constitution, Art. 4, Sec. 2, is that of a citizen of one state to remove to and carry on business in another, without being subjected in property or person to taxes more onerous than the citizens of the latter state are subject to.

Shaffer vs. Carter
252 U. S. 37

The constitutional provision that the citizens of each State shall be entitled to all privileges or immunities of citizens in the several states prevents a State from discriminating against citizens of other states in favor of its own citizens.

Hague vs. C. I. O.
307 U. S. 496

The Privilege and Immunity clause of the Constitution forbids arbitrary distinction against citizens of other States.

Richter vs. East St. Louis and S. RR Co.
20 F. (2nd) 220 (D. C. Mo.)

There are many other cases which hold in unequivocal language that a State cannot discriminate

against citizens of other States in favor of its own citizens,

State of Minn. vs. Barber
307 U. S. 496

Georgia Power Co. vs. City of Decatur
281 U. S. 505

Chalker vs. Birmingham
249 U. S. 522

Hess vs. Pawloski
274 U. S. 352 (1924)

Sunday Lake Iron Co. vs. Wakefield
247 U. S. 350

Walling vs. People of Mich.
116 U. S. 446

Ratta vs. Healy
292 U. S. 263

State cannot establish different codes for citizens of its own and for citizens of other States unless character of the act is affected by residence,

Smith vs. Loughman
157 NE 753
245 NY 486 (1927)

Certiorari denied:
275 US 560

It needs only a reference to the above case to establish that residence has no rationale as far as fishing is concerned.

Another case in point held that the New York income tax law which allows residents of New York one thousand dollars personal exemption but denies same

to non-residents violates the United States Constitution, Art. 4, Sec. 2.

Travis vs. Yale and Towne
252 U. S. 60

Although concerning Alaska, a territory rather than a state, the case of **Haavik vs. Alaska Packers Association,** 263 U. S. 510 (1924) is analogous to the case at bar. An Act of Alaska imposed upon each resident fisherman of Alaska a tax of five dollars for school purposes, and upon each non-resident fisherman a tax of five dollars. The court held the tax valid on the facts which showed that the plantiff, a non-resident, actually was within the jurisdiction of Alaska for four months of the year and was entitled to enjoy the protection of Alaska, and in paying the five dollar tax was paying the same amount required of all residents of Alaska.

Another case concerning Alaska where higher tax for non-residents than residents was held valid is the case of **Anderson vs. Smith,** 71 F (2nd) 493. Here the Court upheld a tax of twenty-five dollars imposed by the Territory of Alaska on non-residents for the use of gill nets. However, the Court stated:

> "Territory of Alaska may fix license fees for fishing in waters of Alaska and in so doing may discriminate between residents and non-residents provided that the license exacted of citizens of the United States non-resident in Alaska **is not so exorbitant as to practically prohibit or so unreasonable as to interfere with rights of fishing granted by Congress."**

In line with this decision is **Freeman vs. Smith,** 44 F (2nd) 703 in which an Alaskan statute exacting a

tax of one dollar on resident fishermen and two hundred and fifty dollars on non-resident fishermen was held invalid.

See also:

Highman Towing Co. vs. Cocreham
70 F. Supp. 628

In **Skiriotes vs. Florida,** cited supra, the court says,

> "Equal protection clause is not violated by a statute, applicable equally to all persons, forbidding use of diving apparatus in taking commercial sponges."

In **Manchester vs. Mass.,** cited supra, we find the language,

> "The statute of Massachusetts . . . . was passed for the preservation of the fish and makes no discrimination in favor of citizens of Massachusetts and against citizens of another state."

In **Barbier vs. Connolly,** 113 U. S. 27, is the rule that the state has broad police powers if it affects equally all persons similarly situated.

The Court's attention is called to the further fact that the Statute, amended Sec. 3379 Statutes of South Carolina, (Record page 15) which fixes the cost of the licenses, not only makes two classifications, to-wit: the amount charged residents as against non-residents, but also differentiates between non-residents, persons of the same class, in that it fixes the license exacted of non-residents who have operated previously for a fixed time off of the shores of the State in the sum of One Hundred Fifty ($150.00) Dollars while it exacts a Twenty-five Hundred ($2500.00) Dollars

license of freshman non-resident fishermen. Such a difference smacks strongly of class legislation.

It is fundamental that residents and non-residents engaged in the same occupation or business may be treated substantially alike in the matter of imposing a business license.

O'Connell vs. Kontojohn
179 So. 802.

A state in promulgating fishing regulations may not make any arbitrary discrimination against any class of citizens; they may attach reasonable conditions as to such matters as the manner in which fishing is done, or as to the size or kind of fish to be taken from the waters of the State,

Fugett vs. State
188 S. W. (2nd) 641 (Ark. 1945)

Thus a tax measure to be valid must lay its burdens uniformly upon all those who come within a proper classification of persons to be subjected to its burden and such classification must have some reasonable basis for differentiation between those who are and those who are not to be taxed and must be founded upon some natural, intrinsic and constitutional distinction,

Koenig vs. Johnson
163 P. (2d) 746 (Cal. App.)

See:

Pac. Coast Dairy vs. San Francisco
8 P. (2nd) 140 (1936)

And so while legislative discretion is broad, nevertheless where such action is manifestly arbitrary, un-

reasonable, inequitable and unjust and causes an imposition of burdens upon one class to the exclusion of another without reasonable distinction, the statute will not be sustained,

State vs. Lawton
172 P (2nd) 465

Under the Puerto Rico organic law where uniformity in taxation is only required on a geographic basis, uniformity can be challenged if the classification is on a discriminatory geographic basis.

So. Port Rico Sugar Co. vs. Buscaglia
154 F (2) 96

followed in Standard Oil Co (N J) vs. Tax Court of Puerto Rico
154 F (2) 293

Similarly a statute relating to itinerant vendors with provision for license fees but with intent that residents of State should not pay license fees nor residents of other States whose laws impose no burden on Maine residents peddling there, held invalid in entirety because of discrimination in favor of Maine residents intended also to reply in reciprocal indulgence to residents of other States,

State vs. Cohen
177 Atl. 403
131 Me. 293 (1935)

Likewise a license ordinance exempting dairy and farm products produced in state was held invalid as abridgement of privilege and immunities rights of citizens of other states,

Ex Parte Smith
128 So. 864
100 Fla. 1 (1930)

And an ordinance which fixed higher license tax for non-resident bakeries than for resident bakeries held unconstitutional under privilege and immunities clauses,

Ward Baking Co. vs. City of Fernandina
29 F (2d) 789
D. C. Fla. 1928

State cannot arbitrarily exclude individual citizens of United States from doing business within State,

Davidson vs. Doherty Co.
241 N W 700
214 Iowa 739 (1932)

See:

Little vs. Miles
169 S E 220
204 N. C. 646

A city ordinance which prohibited issuance of barber shop license to persons not residents of county for at least one year prior to applying, held invalid under privilege and immunity clause.

City of New Brunswick vs. Zimmerman
79 F (2d) 428 (N. J. 1935)

See:

Ex Parte Wacholder
36 P (2d) 705
1 Cal. App. (2d) 254 (1934)

State vs. Johnson
291 S. W. 89
172 Ark. 866

Courts function to determine in each case whether circumstances justify challenged regulations as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.

Paramount Pictures vs. Langer
306 U. S. 619

The limitation on legislative discretion in making classifications in statutes is that classifications should not be arbitrary nor a subterfuge to shield one class and unduly burden another nor unlawfully oppress in its administration.

Frazier vs. State Tax Commission
175 So 402
110 A L R 1479

People vs. Chapman
301 Mich 584
4 N W (2d) 18

State vs. King
188 Atl. 775

Kelso vs. Bush
88 S. W. (2d) 594

Welch vs. State of New Hampshire
306 U S 79

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside; no state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

U. S. Constitution, Art. XIV. Sec. 1

While conceding the broad powers of a State to impose taxes upon its citizens, and in this sense all who transact business within its borders are citizens for the purpose of taxation, such powers are not without constitutional limitation. In **Morton Salt Co. vs. City of South Hutchinson** 159 F (2d) 897, the Court stated,

"But, however great the legislative power of taxation, it is not wholly without constitutional limitations. The due process and equal protection clauses of the Constitution do provide some measure of protection against the abusive exaction of a tax. The test of due process, say the Courts, is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. In other words the query is, what has the state given for which it may ask return. **Wisconsin vs. J. C. Penny Co.**, 311 U. S. 435, 85 L. Ed. 267. If the tax imposed clearly results in such a flagrant and palpable inequality between the burden imposed and the benefits received that it amounts to an arbitrary taking of property without compensation, it is said to violate the Fourteenth Amendment. All of the cases which have affirmed the broad powers of taxation have recognized these limitations."

Another decision which appellants wish to point out is the case of **Glicker vs. Michigan Liquor Commission,** 160 F (2d) 96, which, although concerned with the subject of liquor rather than fishing, is based upon the limitations imposed upon a states' police power by the Fourteenth Amendment. The Court used the following expression,

> "We recognize the right of a State to regulate, or even prohibit, through the exercise of its police power, the pursuit of certain businesses and occupations which because of their nature may prove injurious or offensive to the public. Such regulation is not prohibited by the Fourteenth Amendment, but it is well settled that such regulation is not unlimited in scope, but is subject to the limitation imposed by that Amendment. While the Federal Government does not have the right to regulate such matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment to prevent such regulation from being arbitrary and discriminatory."

In the case at bar, the authorities of South Carolina apparently are proceeding on the theory that the fish and shrimp business is by nature so interwoven with the health, morals and security of the State that the state has the right to regulate and by such regulation to practically prohibit its existence under its police powers. Appellants do not concede that fishing or shrimping are in the same category with the sale of liquors, maintenance of pool rooms, and other occupations that may prove injurious or offensive to the public. Even if fishing were in the same category with

these occupations universally recognized as being the special subjects of police regulations, it still would not be within the province of the State to pass arbitrary and discriminatory legislation.

Appellants contend that the statutes of South Carolina are clearly discriminatory. The taxes required of non-residents of South Carolina are so exorbitant as to practically prohibit fishing, and are thus confiscatory. The annual tax required of a non-resident fisherman is twenty-five hundred ($2,500.00) dollars, while the annual tax imposed on residents of South Carolina is only twenty-five ($25.00) dollars, a difference of one hundred times as much. The statutes impose additional undue burdens such as requiring the catch to be brought into ports of South Carolina for purposes of packing and shipping and then the payment of a poundage tax, which necessitates the renting of facilities and refrigeration since shrimp cannot be dumped into the streets.

In addition the statutes require the payment of Twenty-five hundred ($2,500.00) dollar license unless the fisherman had fished in the waters of South Carolina the previous year, and finally if the cup of the "foreigners" was not already overflowing, that only one hundred of these persons could enter the sacred waters of South Carolina. The only requirement that South Carolina did not exact of these fishermen was a visa and a passport.

The far reaching implications and the malice behind the enactment of these statutes is the unheard of prerequisite to the issuance of a license that income tax be paid by non-residents not on profits from the catch during the year for which the license is being

issued, but on profits earned in the previous year even before the passage of the present statutes without regard to the place where the individual or corporation is domiciled and without regard to the state in which these profits are earned. In other words, this means double taxation in its most onerous form.

Although the lower Court ruled against appellants in holding that the statutes under attack were constitutional, it indicated that it was ruling adversely to appellants because it felt it was a Court created for the determination of questions of law rather than policy and it was bound to follow what it thought to be the previously established rules of the Federal Court. The Court's attention is, therefore, called to this expression by the learned Judge of the lower Court who wrote the opinion, "If these decisions are to be over-ruled, the matter is one for the Supreme Court and not for us." (Record page 55).

E. BECAUSE THEY ARE IN CONFLICT WITH FEDERAL AUTHORITY OVER, AND FEDERAL POLICY WITH RESPECT TO, FISHING ON THE HIGH SEAS.

In so far as they apply to fishing in coastal waters, they also conflict with Federal authority and policy in coastal waters.

The appellants' occupation is primarily that of fishing on the high seas and in the Atlantic Ocean.

See:

U. S. vs. Rogers
150 U. S. 249, 281

for definition of "high seas," also,

1 Benedict on Admiralty, 84

Consistent with our traditional national policy of "freedom on the seas,"

See:

> U. S. vs. California, supra, in which this Court held, "This Country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations,

this Court has said that "the Ocean belongs to no one nation but is the common property of all." **Lord vs. Goodall,** 102 U. S. 514, 544. Clearly, fishing in the ocean and on the high seas, as navigation, is "necessarily national in character and a matter of 'external concern' affecting the nation as a nation in its external government." **Lord vs. Goodall,** supra, at p. 544.

See:

> U. S. vs. California, supra,
>
> "But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units."

In addition to the exercise by Congress (pursuant to its authority under Article I, Section 8 of the Constitution) of jurisdiction over the high seas generally by express Congressional acts, e. g. Navigation (33 U.S.C.) and Shipping (46 U.S.C.), Congress has enacted particular legislation pertaining to "Regulation of Fisheries" (Ch. 17, U.S.C., Sec. 531-534).

Moreover, as this Court has pointed out "controversy has arisen among nations about rights to fish in prescribed areas" (**U. S. vs. California**, supra, at p. 1421).

And these international controversies were resolved not by action by the states or territory involved but by the national government through its treaty-making power,

See:

U. S. vs. California, supra, at p. 1423.

and these treaties drew no so-called "three-mile line."

See:

37 U. S. Stat. at II, 1542, U. S. Treaty Series No. 564

Northern Pacific Halibut Act of 1937, 50 Stat. 325, 16 U.S.C. Sec. 772

Halibut Treaty, Treaty Series No. 917

Salmon Convention of 1930, Treaty Series No. 918

For both history,

See:

e. g. Treaty of 1778 with France, 8 Stat. 12, 16

Convention of 1818 with Great Britian, 8 Stat. 248, 249

Treaty of 1871 with Great Britian, 10 Stat. 1090, 17 Stat. 863, 869, 870

Convention of 1937 with Canada, 50 Stat. 325, 16 U.S.C. 772

and experience,

See:

Jessup, Law of Territorial Waters and Maritime Jurisdiction (1927) at P. 462

Fulton, Sovereignty of the Sea (1911), Ch. V, (pp. 694-740)

Daggett, The Regulation of Maritime Fisheries by Treaty (1934), 28 A.J.I.L. 693

Jessup, The Pacific Coast Fisheries (1939), 33 A.J.I.L. 129

Allen, Control of Fisheries beyond Three miles (1939), 14 Wash. Law Rev. 91

have demonstrated the truism of the expression that "fishermen, fish and ocean currents pay little attention to these lines or so-called territorial waters."

Thus, pursuant to Executive Order No. 9634 (10 Fed. Reg. 12305), the President, in Proclamation No. 2668 (Sept. 25, 1945, 10 Fed. Reg. 12304), recognized the "inadequacies of present areas for protection of fishery resources contiguous to its coasts;" and with a view of "improving the jurisdictional basis for conservation measures and international cooperation" proclaimed our national policy "with respect to coastal fishing in certain areas of the high seas," both in areas developed by our nationals alone and jointly with other nationals.

Thus the Proclamation announces the principle that where fishing activity "have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones of either established under agreements between the United States and such other States; and all fishing activities

in such zones shall be subject to regulation and control as provided in such agreements."

It is submitted, therefore, that because of the present day vast economic importance of the fishery industry and its complex relations not only to the individuals, the States and the National Government, but also as it affects the citizens, the States and the National Government in their relations with the citizens of foreign states and those foreign countries themselves, that the right to regulate fishing, both in the coastal waters on the high seas, and upon the high seas beyond the three-mile limit, has become vested in the National Government, and particularly in so far as they affect running or migratory fish and shirmp.

Expanding economic changes and the growth of commerce require elasticity in the law. This Honorable Court has never taken a straight jacket position on such matters. The tendency of the Court to extend the 14th Amendment to primaries, etc. is just one evidence of that fact. Had this Court adhered to the orthodox view of the trial Court, the right of the government to build or help build the present system of highways and other vast powers exercised by the government in advancement of science, health, education, and the welfare of its people could not have been undertaken under present Constitution, and much of the growth of the United States would have been retarded.

We submit that the States acquire no exclusive proprietory rights over such fish or shrimp while passing through their waters and if they do acquire the right of regulation, it must be exercised reasonably and judiciously with due regard to the rights of other states and the inhabitants thereof.

SUMMARY

Appellees place great stress upon the decision of **McCready vs. Virginia,** 94 U. S. 391, contending that based upon this decision the State has jurisdiction to control its fisheries to the exclusion of citizens of other states and its own citizens. The McCready case was concerned with waters within the limits of the state and in that case there was no question of the fact that the statute was a bona fide conservation statute. The case of **Pollards Lessee vs. Hagin,** 3 How. 212, like the McCready case, was merely concerned with inland waterways. In commenting on the Pollard case, Mr. Justice Black in the case of **U. S. vs. California,** cited supra, stated, "We are not persuaded to transplant the Pollard Case of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean."

Appellees also argue that the Manchester, Louisiana and Abby Dodge cases cited in **U. S. vs. California,** are authorities for the proposition that the state has unlimited right to control fishing.

The Supreme Court answered this question on page 16 of the decision in U. S. vs. California where the court used this expression, "That this question remained undecided is evidenced by **Skiriotes vs. Florida,** 313 U. S. 69, where we had occasion to speak of Florida's power over sponge fishing in its territorial waters. Through Mr. Chief Justice Hughes we said: 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the state statute so far as applied to conduct within the territorial waters of Florida . . . is within the

police power of the State." In other words the Supreme Court in the California case stated that if the states did have powers over fishing it was limited to conduct within the police powers and did not give the state the right to tax indiscriminately.

Other cases cited by appellees are not authorities for the purposes contended by appellants. In the case of **Patsone vs. Penn.**, 232 U. S. 138, the court merely held that the state had a right to deny aliens the right to use guns and therefore could restrict the right to hunt. This decision is based on the police powers of a state.

Another case along these lines is the very recent decision of the Supreme Court of California entitled **Takahashi vs. Fish and Game Commission** rendered October 17, 1947 and reported in 30 A. C. 723 et seq. The case deals with the rights of the State of California to prohibit commercial fishing by aliens. Although in the obiter by a majority of the Court it reiterates the position of the appellees, we cite this case because we feel that it is proper to call to the attention of the Court the language of Judge Carter who on page 745 of the dissent, said,

> "While the State may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection clause of all meaning."

The statutes involved in the case at bar are not conservation or preservation measures for many reasons. It is a matter of common knowledge that shrimp are migratory in nature and are found along the wa-

ters off the shores of different sections of the United States at various times of the year. If such fish or shrimp were local both as to origin and as to habitat, it is conceivable that a state could, where it was absolutely necessary, pass effective conservation measures, such as Florida did in the sponge case where it prohibits the use of machinery for taking sponges, and such as other states might do in reference to timber or other products of the soil that are local in character. Free running or swimming fish know no borders and therefore it is idle to engage in the pretense that any state could pass conservation measures dealing with migratory shrimp when no one even knows what percentage of these shrimp pass on their journey within the mythical three-mile limit of the state. Where bona fide conservation measures have been passed, in each case the record has disclosed not only the necessity for such laws but the operation of the same has been made in such a way that like the rain it falls equally upon the rich and the poor alike.

It is a well known fact in the southeastern portion of the United States that keen rivalry has arisen between the states of South Carolina, Georgia and Florida in regards to shrimp and fish. The growth of the shrimp industry in Georgia and Florida has outstripped the growth of the shrimp industry in South Carolina and in order to freeze out and smother the fishing industry in these other two states South Carolina publicly and deliberately without rhyme or reason, in the belief that it had absolute and despotic power, undertook to pass laws which were destined to accomplish this sinister purpose. This is not the first time in the history of South Carolina that it has un-

dertaken to flaunt the laws of this country, and in this case it is living up to the motto engraved on its flag, "Don't tread on me." All laws must have a reasonable relation to the objects for which they are passed. If South Carolina had seen the necessity to conserve shrimp caught for consumption in that state it would have undertaken to have limited the number of pounds of shrimp that could be caught in any one season. Laws of such a type are not drawn without great care nor are they loosely worded, especially where the framers thereof know that they will be tested in the highest courts of the land. These statutes are not conservation measures because they do not "conserve the shrimp caught for consumption in the state of South Carolina." They are not health measures because no provision is made for inspection. They are not police regulations because no provision is made for regulations or enforcement. They are actually not tax measures because the state of South Carolina knows that no non-resident could pay the license exacted of him and operate for more than one season. They are purely "Hitlerian" laws.

Appellees fall into the error of contending that since these statutes are allegedly conservation measures, they are therefore ipso facto legal, regardless of how many sections of the Federal Constitution they violate. We are not so certain that this Court would agree, even if the record showed these measures to be conservation measures.

Appellants share the same high regard for the learned Judge who wrote this opinion as this Court does. We fear that the trial Court failed to carefully scan the record in this case and assumed that since the

statutes purported to be conservation measures, they were just that, and therefore the old rule of self preservation should first be applied. The facts however, negative such a view. The record shows that there were more shrimp hauled out of the waters of South Carolina after the enactment of this law than before, and that its only effect has been to create a monoply for the shrimping interests of South Carolina.

Assuming that this Honorable Court might hold to the view of appellees that the states possess this unbelievable right, we come to the final proposition as to how far can a state go to discriminate unreasonably and unjustly. This great nation has the inherent and unquestioned power to bar aliens and undesirables from her shores, but once this country removes the barrier and admits them, can this nation then deny to them the use of the courts, the right to labor, or own property, to trade or enjoy the four freedoms? By the same analogy, granting that the state had the right to determine when its doors should be closed for reasons best known to itself, could it after having opened these doors, proceed to discriminate unjustly and unreasonably against the citizens of other states, or is it compelled to obey the laws of the land in the same degree that this country expects other citizens to act.

The issues involved in this case are much deeper than the question as to whether or not the waters off the state of South Carolina should be closed to the residents of the forty-seven other states. The issues involved will determine whether or not this country should be cut up into forty-eight "little worlds." If any one state is given the right to drop an iron curtain around its boundaries or keep out the citizens

of another state because it feels that it has a monopoly over certain products peculiar to that state then it would be possible for states such as Pennsylvania and Alabama to tie up all the manufacturing enterprises in this country by cutting off the supply of coal unless royalties were paid or concessions or subsidies granted, Colorado could hold back the supply of copper, Texas could curtail the supply of oil, a few Southern states could hold back their supply of cotton and tobacco, and eventually, instead of having a system based on our present theory of free trade, we would have one in which each State could have its own tariff wall and the barter system would be the prevailing scheme. As we have previously pointed out in this brief, changing philosophies of life are necessarily causing a change in our economic and legal concepts. Great changes have taken place within the past decade. Shortly after the First World War the Congress of the United States passed the Johnson Act which undertook to prohibit the United States from making any loans to foreign countries who had not repaid loans made to them for rehabilitation purposes after the First World War, and yet within twenty years we find the almost unanimous desire in this country, in order to check the spread of Communism, that this country send billions of dollars to the hungry and oppressed people of Europe that these people may rise and live again.

We feel that even under the law as it stood at the time of the McCready case that the state of South Carolina had no right to enact the present measures. The statutes in question reflect a philosophy that has "Gone with the Wind," and under the law as it now exists, such statutes are untenable.

The Court's attention is called to the fact that there is no dispute as to the facts of said case. No exceptions to conclusions of fact as found by the three Judge Court, nor to any of the evidence offered have been made. Therefore, the case at bar does not hinge on any controverted facts, but rather on the inferences, implications and conclusions which follow from the established facts.

On page 60 of the printed record, the trial Court found certain conclusions of fact to which reference is made. These facts sustained the question of jurisdiction. The Court found that the plaintiffs fished for shrimp within and without the three mile maritime belt of the ocean off the shores of the State of South Carolina and that the plaintiffs are subject to the statutes in question, and that **"plaintiffs will be unable to continue their business if these statutory penalties are invoked against them."**

> The Court further found on page 61 of the printed record that "if the contentions of the plaintiffs as to the invalidity of the statutes were valid, they would be irreparably damaged by their enforcement and have no adequate remedy at law, in that they would be forced by defendants to pay large sums by way of taxes for which no means of recovery is provided by law**********the tax or the injury in case of some of the plaintiffs being well in excess of $3,000.00".

Appellants have contended that the record shows that the statutes in question were not bonafide conservation measures, and that as a result of their enactment, more shrimp have been caught than before the statutes were adopted.

In support of this contention, appellants call the Court's attention to stipulation 10 on page 30 of the printed record, which follows:

> "It is stipulated and admitted that the South Carolina Fishing Commission issued more fishing licenses the year of 1947 than it did in the year 1946. In the year 1946 two hundred fifty-four (254) licenses were issued, of which one hundred fifty-four (154) were for South Carolina residents and one hundred (100) for out of state residents. In the year 1947 two hundred seventy-one (271) had been issued, of which all but fifteen (15) were to South Carolina residents."

On page 38 of the printed record appears the Thirty Eighth Annual Report of the South Carolina Board of Fisheries, Year ending June 30, 1944, in which the statement is made,

> "There were 115 shrimp boats operating in South Carolina waters during this season which is a slight increase over the number of boats operating last season. ********** We feel that there is an increase in the amount of shrimp in our waters this season."

On pages 39, 40 and 41 of the printed record appears the Thirty-Ninth Annual Report of the State Board of Fisheries, Year ending June 30, 1945, in which the statements are made,

> "O.C.F. has authorized construction of 2,128 fishing craft. All but 85 of which are expected to be completed end of this year. **This will make productive capacity greater than at any time in our history.** This signifies that the fishing industry should begin to spend more money in merchandising its

products than ever before in its history ********** South Carolina is in dire need of having the proper facilities to ice fish, shellfish and cold storage facilities for same, and other equipment such as proper docks, etc. **If these facilities were available, in our judgment, it would increase the volume of the fish industry many times.**

Again on page 40 of the printed record appears the comment,

"The addition of 500 trawlers in the Atlantic area will greatly increase the efficiency of the shrimp fleet and increase its range."

Again on page 41 of the printed record appears the statement,

"We are expecting an enormous increase in the volume of shrimp during the coming year as the war restrictions will be raised, and we are expecting labor to be plentiful. There will be an increase in the number of boats and the demand is large, and, we think, will take up our increase for the coming year.

On page 44 of the printed record appears the Fortieth Annual Report of the State Board of Fisheries, Year ending June 30, 1946, in which the statement is made,

"The shrimp industry has grown very materially during the past season over the previous season. I will show you the figures of the past season which was 1944-1945 and the present season which is 1945-46. The boats operating in South Carolina in 1944-45 were 156 consisting of boats owned by the citizens of South Carolina 77 and boats owned outside 79. The number of boats

operating in our State in the 1945-46 season was 254. Number of boats owned by citizens of South Carolina was 154. Number of boats operating in State by outsiders was 100. **We are very much pleased to see the decided increase of the state owned boats operating in this State."**

Again the statement on the same page,

"The number of pounds of shrimp caught during the season 1944-45 in the coastal waters of South Carolina amounted to 2,548,955 lbs. Shrimp headed amounted to 1,535,355 lbs, in the 1944-45 season. Shrimp caught in the South Carolina waters in the 1945-46 season amounted to 5,037,065. Shrimp headed in the 1945-46 season amounted to 3,021,343 lbs. **To be able to make this report is certainly a pleasure to the State Board of Fisheries as we are able to show that the catch of shrimp this season was nearly twice as large as in the previous year."**

In support of our contention that shrimp are a migratory fish and neither spawn nor are they local to the waters of South Carolina, we submit the following portions of the record, to-wit;

Testimony of **S. W. Davies** on page 31 of the printed record,

"The shrimp follow the season and they work their way down the coast and that is the reason I am not fishing in Georgia waters at this time." ********** The shrimp run on the coast from one state to the other and we follow them up and down the coast."

Testimony of **George G. Dodge** on page 33 of the printed record,

"I would say the fishing season off the coast of South Carolina runs from eleven to thirteen weeks, from the middle of August, until the end of September. The shrimp then move south. They begin their southward migration about just as soon as it begins to get cool."

In its Fortieth Annual Report, the State Board of Fisheries, on page 42 of the printed record says,

"The greater portion of the shrimp reared in North Carolina, South Carolina, Georgia and North Florida are migratory moving south along the coast during the fall and wintering in Central Florida." *********
The accumulation of the facts secured by the above described means shows that the spawning occurs from March into September in the open waters of the Atlantic Ocean."

In support of our contention that the poundage tax is being imposed on imports, we wish to cite the following portions of the record:

Testimony of **S. W. Davies** on page 32 of the printed record,

"We fish outside in the ocean. At times we are out five or six miles and at times we are right against the shore, according to where we locate the shrimp at. We do not fish in inland waters, but we do fish within the three mile limit."

On page 33 of the printed record, Mr. Davies testified,

"This fishing out of season was off the coast of South Carolina in the open sea."

In support of our contention that the license and

the poundage tax sought to be exacted, including the attempted collection of an income tax are an unreasonable burden on interstate commerce, we cite page 34 of the printed record, testimony of George G. DODGE,

> "I would estimate that 95 or 98 per cent of the shrimp that are caught enter interstate commerce and most of the shrimp are shipped to New York, Baltimore, Philadelphia and Washington."

In support of our contention that the payment of the various licenses, taxes etc would be confiscatory, we cite page 34-35 of the printed record, testimony of the same witness,

> "Then if I paid the South Carolina tax of Twenty-Five Hundred ($2,500) Dollars, the non-resident license, the boat earnings would be insufficient to pay the license if I packed them in South Carolina I would have to pay a packing charge of Five ($5.00) Dollars a box, which would further reduce my profit. The loss would be so considerable on each boat as to make it prohibitive."

Further on page 40 of the printed record, reading from the Thirty-Ninth Annual Report of the South Carolina Board of Fisheries,

> "Shrimp are generally recognized as being a highly perishable food. Unlike meats they are susceptible to a ripening process. It is therefore, essential to keep them packed in ice or stored at temperatures low enough to prevent spoilage or to subject them to some form of preservation. **With such a product, speed, and distribution to consuming centers is a factor of importance.**"

Despite this admonition, the statutes require that the shrimp be brought into ports of South Carolina, taken off the boats where they are already placed in ice containers (altho the record is silent on this, it is a matter of common knowledge) required to be re-packed, and of course re-iced, and then shipped with danger of spoilage, cost of additional money and loss of time in getting them to the consuming markets.

We refer the Court to a previous statement in the Thirty-Ninth Annual Report of the South Carolina Board of Fisheries on the necessity of refrigeration facilities.

The real reason behind these statutes are found in the admission by the South Carolina State Board of Fisheries in the Thirty-Eighth Annual Report on page 38 of the printed record,

> "The shrimp boats operating in our waters are from many other states as we have a very small fleet of shrimp boats owned by South Carolinians." (Our comment, conditions changed after the passage of these restrictive measures).

On page 47 of the printed record, in excerpts from the Thirty-Ninth Annual Report, this same board says,

> "Now that the was is over we feel that conditions will soon be normal and that there will be quite an increase in the production, also, that labor will be more plentiful and thereby place the fishing industry on a very profitable basis."

In other words, now that the war is over, this is too good a thing to let outsiders profit in.

When this case was argued before the three Judge Court the appellants pointed out to that Honorable body the dangers which lie in the wake of such legislation. We argued that repressive measures beget repression and that sister states of South Carolina would not long remain quiescent in the face of the clamor of their own citizens who would be incensed because of these iniquitious laws. The Associated Press on November 24, 1947 carried a news item to the effect that the state of Florida had retaliated and was refusing even to issue licenses to fishermen of South Carolina who sought to comply with its provisions. Confirmation of the Associated Press dispatch is found in House Bill 438, Chapter 23777, Acts of 1947 of the State of Florida and the opinion of Hon. J. Tom Watson, Attorney General of Florida under date of December 18, 1947. The bill itself makes it unlawful for any non-resident person "to take or catch or assist in taking or catching, or for any non-resident boat to be used for that purpose ******* or to buy, sell or offer for sale any shrimp unlawfully taken or caught, unless a license had been issued." It further provided that non-residents could not obtain such a license unless a reciprocal agreement had been entered into with the authorities of the non-resident's State.

The Attorney General in his opinion, went a step further and held that the act applied not only to non-residents of South Carolina and their vessels, but also that they could not register their boats in Georgia and then take advantage of the Georgia-Florida reciprocal agreement.

The above proves that a chain reaction against South Carolina has set in among the various states

affected. Similar action will undoubtedly be taken as soon as the legislatures of the other states convene.

If these laws are upheld, other states which have fishing interests can be expected to retaliate in quick succession. We feel therefore, that a decision by your Honorable body against these measures would be the means of preventing not only the state involved but many other states from passing laws that infringe upon the privileges and immunities of the citizens of the several states in many other fields. Because of the legal authorities and the reasons presented in this brief we feel that the judgment of the learned trial court should be reversed and that each and every one of the statutes set forth should be declared illegal and unconstitutional.

Respectfully submitted,

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